BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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APPLICATION TO CHANGE WATER RIGHT NO. 76H 30148404 BY YC PROPERTIES LLC	)))	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On May 1, 2020, YC Properties LLC (Applicant) submitted Application to Change a Water Right No. 76H 30148404 to change Provisional Permit No. 76H 72226-00, to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website May 4, 2020. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 22, 2020. The Applicant responded with information dated December 10, 2020. The Application was determined to be correct and complete as of September 30, 2022. The Applicant submitted a Waiver of Statutory Timelines Form on January 25, 2023. An Environmental Assessment for this Application was completed on January 31, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606-IR
- Place of Storage Addendum (Form 606-PSA)
- Attachments
    - Appendix A – Project Maps & Aerial Findings Index
    - Appendix B – Site Visit Photo Plates & Maps
    - Appendix C – Water Right Abstracts
    - Appendix D – Manning's Equation Worksheets
    - Appendix E – Painted Rocks Water Users Association Records
- Maps:
    - 2017 NRIS Aerial Photo Depicting Claimed Place of Use and Supplemental Rights
    - 2017 NRIS Aerial Photo Depicting Claimed Place of Use and Point of Diversion

- 2017 NRIS Aerial Photo Depicting Claimed Point of Diversion, Conveyance, and Place of Storage
- 2017 NRIS Aerial Photo Depicting Proposed Project
- 1958 Ravalli County Water Resource Survey Map
- Aerial Photos from 1990 and 1995 depicting Historical Irrigated Acreage

Information Received after Application Filed

- Response to Deficiency Letter dated December 7, 2020, and received by the Department on December 10, 2020
- Waiver of Statutory Timelines Form Received on January 25, 2023

Information within the Department's Possession/Knowledge

- DNRC surface and groundwater right records
- 1958 Ravalli County Water Resources Survey maps, field notes, and aerial photos
- Montana Cadastral parcel and property information
- Application materials for pending Change Application Nos. 76H 30148402, 76H 30148403 and 76H 30158433
- Department Technical Report dated September 30, 2022

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents

- DNRC Historic Diverted Volume Standard Methodologies Department Memo, dated September 13, 2012
- DNRC Consumptive Use Methodology Memo, dated March 17, 2010
- DNRC Consumptive Use and Irrecoverable Loss Memo, dated April 15, 2013

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant is proposing to change Provision Permit (Permit) 76H 72226-00. The permit was certified by DNRC on November 4, 2002, for a flow rate of 340 gallons per minute (GPM) and a diverted volume of 248.55 acre-feet (AF) from three groundwater wells for the purposes of domestic, stock, and sprinkler irrigation with a priority date of August 22, 1989. The period of use is January 1 to December 31 for domestic and stock use, and April 15 to October 1 for irrigation. The period of diversion is January 1 to December 31 annually. The place of use for irrigation is 120 acres in the S2SESW of Section 26 and W2NWNE, NENW, and SENW of Section 35, all in T6N, R21W, Ravalli County. Permit 76H 72226-00 lists two places of storage consisting of a 33.6 AF capacity reservoir in the S2NWNE of Section 35, and a 3.2 AF capacity reservoir in the NWNWNE of Section 35, both in T6N, R21W. The points of diversion are three groundwater wells (Nos. 1, 2, and 3) located in the SWSENW of Section 35, T6N, R21W, Ravalli County, approximately 1.5 miles west of the town of Hamilton. Table 1 shows the elements of Permit 76H 72226-00.

Table 1: Elements of Water Right Proposed for Change (Permit 76H 72226-00)

Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Place of Storage	Priority date	Acres
Domestic Irrigation Stock	340 GPM	248.55 AF	01/01 - 12/31 04/15 – 10/01	SWSENW of Sec 35, T6N, R21W	SENW NENW W2NWNE of Sec 35 T6N, R21W S2SESW of Sec 26, T6N, R21W	33.6 AF S2NWNE, 3.2 AF NWNWNE, Sec 35, T6N, R21W	8/22/1989	120

2. Permit 76H 72226-00 is supplemental to five water rights, Statement of Claim (Claim) 76H 2508-00, Claim 76H 2509-00, Permit 76H 12497-00, Permit 76H 124237-00 and Permit 76H 147925-00. These water rights have irrigation places of use that overlap with the 120-acre place of use listed on Permit 76H 72226-00.

3. The Applicant filed change applications for Statement of Claim (Claim) Nos. 76H 2508-00 (Change Application No. 76H 30148402), 76H 2909-00 (Change Application No. 76H 30158433) and Permit No. 76H 15711-00 (Change Application No. 76H 30148403), which are being processed concurrently with the subject application. Individual elements of the supplemental water rights are shown below in Table 2.

Table 2: Supplemental water rights

WR Number	Flow Rate	Purpose	Period of Use	Place of Use	Point(s) of Diversion	Priority Date
76H 2509-00	336.60 GPM	Irrigation	4/15 - 10/19	NWNE, S35, T6N, R21W; NENW, S35, T6N, R21W; SENW, S35, T6N, R21W	NENENE, S29, T6N, R21W	6/1/1887
76H 2508-00	3.33 CFS	Irrigation	4/15 - 10/19	NWNE, NENW, SENW S35, T6N, R21W	NENWSW, S27, T6N, R21W	12/31/1881
76H 124237-00	314.16 GPM	Irrigation	4/1 – 10/31	S2SESW S26, N2NENW S35, T6N, R21W	NENENE S29, T6N, R21W	6/1/1887
76H 147925-00	125.66 GPM	Irrigation	4/15 - 10/19	S2SESW S26, T6N, R21W	NENWSW S27, T6N, R21W	2/7/1891
76H 12497-00	200 GPM	Irrigation	4/1 – 10/1	SW S26, T6N, R21W	SESESW S26, T6N, R21W	4/27/1977

4. Permit 76H-72226-00 consists of three groundwater wells, two of which are connected to Reservoir No. 2, and subsequently to Reservoir No 3. Well No. 1 (GWIC ID #5562) has a 0.5 hp motor, a 6-inch casing, and produces a flow rate of 10 GPM which is used solely for in-house domestic purposes and is not connected to the other two wells or reservoirs. There is no change in water use proposed for Well No. 1. Well Nos. 2 & 3 convey water to Reservoir No. 2 via a 6-inch pipeline for irrigation of the 120 historical acres and stock use. Well No. 2 (GWIC ID #55660) has a 15 hp motor, a 8-inch casing, and produces a flow rate of 130 GPM. Well No. 3 (GWIC ID # 55659) has a 15 hp motor, a 10-inch casing and produces a flow rate of 200 GPM.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant is proposing to relocate Reservoir No. 3 from the NWNWNE of Section 35 to a new location in the E2E2NW of Section 35, just west of existing Reservoir No. 2. The Applicant is also proposing to reconfigure Reservoir No. 2 to reduce the surface area from 3.5 acres to 3 acres. The relocated Reservoir No. 3 will be renamed Reservoir No. 1 and will be 0.59 surface acres and have a capacity of 2.36 AF. The reconfigured Reservoir No. 2 will have a capacity of 28.5 AF. Water pumped from Well Nos. 2 and 3 will be conveyed to the new Reservoir No. 1 via a 6-inch pipeline before being conveyed to Reservoir No. 2 via an open earthen ditch.

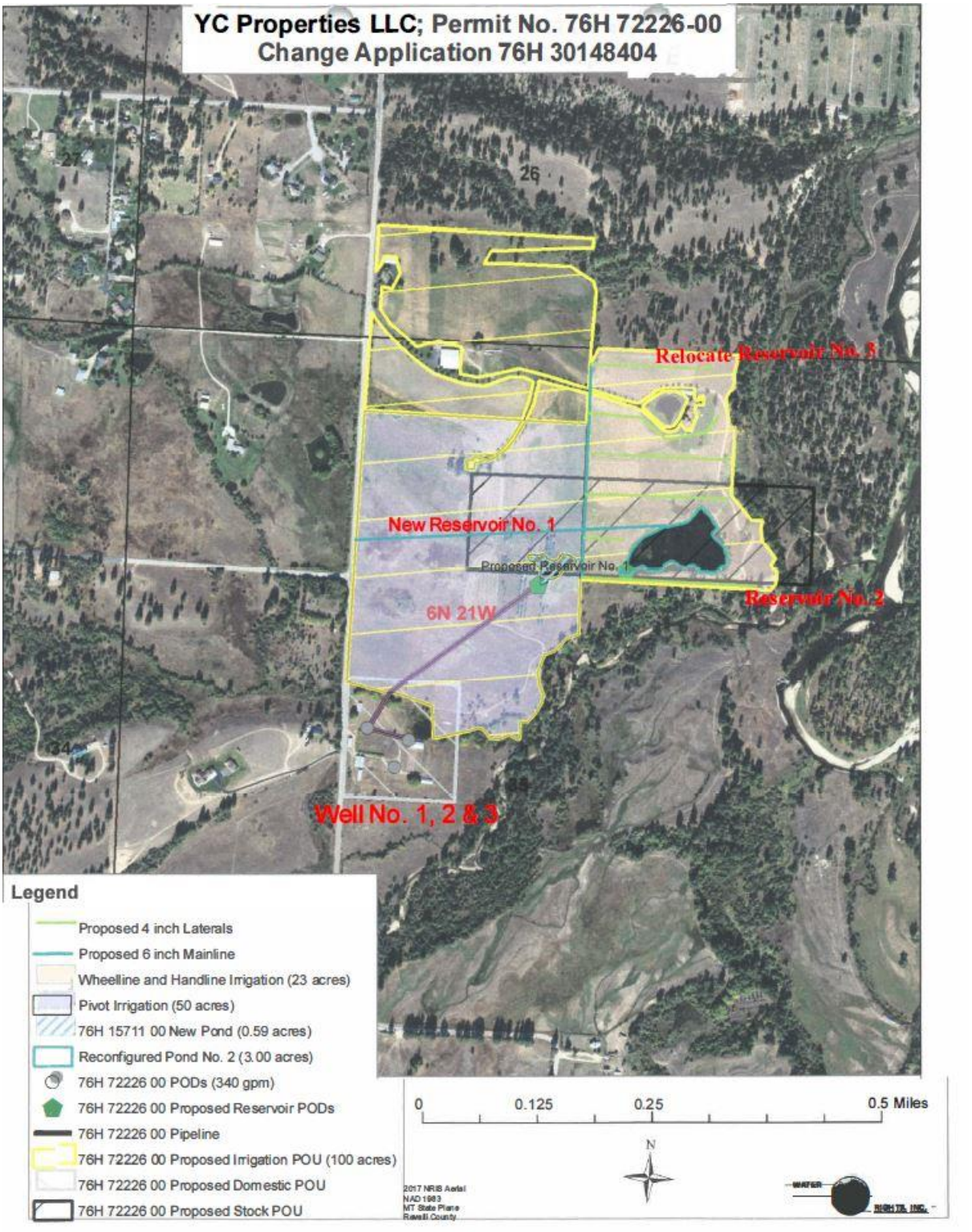
Water supplied by Permit 76H 72226-00 after this change will continue to be used for stock watering out of the two reservoirs (Reservoir Nos. 1 and 2), with the relocation of new Reservoir No. 1 resulting in a change in place of use for stock watering. In addition to providing stock water, irrigation water will continue to be pumped out of reconfigured Reservoir No. 2 per the historical practice. Well No. 1 will be used solely for the domestic purpose and will not be altered or changed in any way by this application.

6. This change application is being processed concurrently with three other change applications as part of the Applicant's overall irrigation improvement project. Four separate change applications are required under the provisions of ARM 36.12.1901(7), because upon authorization of the proposed changes the sources, purposes, and places of use of the four subject water rights will not be identical. Along with the changes proposed for Permit 76H 72226-00 as described in FOF 6, the overall project involves eliminating one 5 AF capacity on-stream reservoir on Sawdust Creek (Change Application No. 76H 30148403) and relocating a second 3.2 AF capacity reservoir and reducing its size, and reducing the surface area and capacity of existing 33.6 AF capacity Reservoir No. 2 (subject application). Two of the three reservoirs proposed for change were originally filled with water diverted from groundwater wells (Permit 76H 72226-00) and Sawdust Creek (Permit 76H 15711-00). The on-stream reservoir was filled only by Sawdust Creek. The Applicant's Canyon Creek (Claim 76H 2508-00) and Barley Creek (Claim 76H 2509-00) irrigation water rights did not historically utilize storage. Reservoir Nos. 1 and 2 are being added to the Canyon and Barley Creek rights in pending Change Application Nos. 76H 30148402 and 76H 30158433. The purpose of the reservoir relocation and resizing project is to improve the irrigation infrastructure on the property by creating a centralized pumping reservoir for sprinkler irrigation (reconfigured Reservoir No. 2). Proposed Reservoir No. 1 will also perform the function of trapping sediment and debris before water is conveyed to Reservoir No. 2. The Applicant is not proposing to change the irrigation place of use for any of these water rights. The Applicant's water rights and change applications are listed in Table 3 below.

Table 3: Applicant's water rights, change applications, and post-change storage

Water Right	Change Application submitted	Source	Type
Claim 76H 2508-00	76H 30148402	Canyon Creek	Statement of Claim
Claim 76H 2509-00	76H 30158433	Barley Creek	Statement of Claim
Permit 76H 15711-00	76H 30148403	Sawdust Creek	Provisional Permit
Permit 76H 72226-00	76H 30148404	Groundwater	Provisional Permit

Map 1


YC Properties LLC; Permit No. 76H 72226-00
Change Application 76H 30148404
Relocate Reservoir No. 3
New Reservoir No. 1
Proposed Reservoir No. 1
Reservoir No. 2
6N 21W
Well No. 1, 2 & 3
Legend
Proposed 4 inch Laterals
Proposed 6 inch Mainline
Wheelline and Handline Irrigation (23 acres)
Pivot Irrigation (50 acres)
76H 15711 00 New Pond (0.59 acres)
Reconfigured Pond No. 2 (3.00 acres)
76H 72226 00 PODs (340 gpm)
76H 72226 00 Proposed Reservoir PODs
76H 72226 00 Pipeline
76H 72226 00 Proposed Irrigation POU (100 acres)
76H 72226 00 Proposed Domestic POU
76H 72226 00 Proposed Stock POU
0
0.125
0.25
0.5 Miles
N

CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

> (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
> (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
> (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
> (c) The proposed use of water is a beneficial use.
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. Per Administrative Rules of Montana (ARM) 36.12.1902(1)(b), the historical information for a Provisional Permit must be described as it was used as of the date of Project Completion Notice filing. The Project Completion Notice for Permit 76H 72226-00 was received by the Department on November 26, 1999, and the permit was certified on November 4, 2002, for 340 GPM up to 248.55 AF.

10. The points of diversion for Permit 76H 72226-00 consists of three groundwater wells, two of which are currently connected to Reservoir No. 2, and to Reservoir No. 3 via a pipeline from Reservoir No. 2. According to information submitted in the application materials, Well Nos. 2 & 3 convey water to Reservoir No. 2 at a total flow rate of 330 GPM via a 6-inch pipeline for wheel line irrigation of the 120-acre permitted place of use, and for stock use in both reservoirs. All three wells are located in the SWSENW of Section 35, T16W, R21W. Well No. 2 is an 8-inch cased well fitted with a 15 hp motor that pumps water at a flow rate of 130 GPM. Well No. 3 is a 10-inch cased well fitted with a 15 hp motor that pumps water at a flow rate of 200 GPM. Well No. 1 is a 6-inch cased well fitted with 0.5 hp motor that pumps water at a flow rate of 10 GPM and is used solely for domestic purposes. This well is not connected to the other two wells and the use of this well will not change. Based on this information the Department finds the maximum historical diverted flow rate for Permit 76H 72226-00 equals 340 GPM.

11. The priority date of Permit 76H 72226-00 is August 22, 1989, and the right has a period of diversion from January 1 to December 31 for domestic and stock use, and April 15 to October 1 for irrigation. The change application materials state that water was usually diverted starting around April 15th, depending on weather, and continued until October, or earlier depending on frost. Sprinkler irrigation ceased for about two weeks, three times a year for haying. Once haying was complete, irrigation was operated at full service.

12. The permitted irrigation place of use for Permit 76H 72226-00 consists of 20 acres in the S2SESW of Section 26 T6N, R21W, 20 acres in the W2NWNE, 40 acres in the NENW and 40 acres in the SENW, all in Section 35, T6N, R21W, Ravalli County. Department review of aerial photographs from 7/17/1990, 9/1/1990 and 7/31/1995 (provided by the Applicant) found that 96.6 acres were irrigated within the 120-acre permitted place of use.

13. The Applicant elected to have the Department calculate historic consumptive use per ARM 36.12.1902(16). The historical method of irrigation was wheel and handline sprinkler irrigation with water secondarily diverted by two separate pumps in a pumphouse located at Reservoir No. 2. Water was pumped out of Reservoir No. 2 into two 6-inch irrigation lines, one running roughly north and one south to distribute the water throughout the place of use. The weather station used for calculating historic consumptive use is the Hamilton weather station, which represents a similar elevation and is the closest station to the place of use. The seasonal evapotranspiration (ET) of sprinkler/flood irrigation for the area, as identified by the Irrigation Water Requirements program (IWR) is 19.93 inches. By applying the Ravalli County management factor for 1973 to 2006 of 88.6%, the adjusted ET is 17.66 inches or 1.47 feet. Therefore, the crop consumptive volume for the 96.6 irrigated acres is 142.1 AF (17.66 inches ÷ 12 inches/foot x 96.6 acres = 142.1 AF).

14. The Department applied an on-farm efficiency of 70% for the historical sprinkler-irrigated field. On-farm efficiency refers to the percent of water delivered to the field that is used by the crop. Applying an on-farm efficiency of 70% for wheel and handline sprinkler irrigation to the 142.1 AF crop consumptive use leads to a field applied volume of 203.1 AF (142.1 AF ÷ 70% = 203.0 AF).

15. For sprinkler irrigation, the Department assumes 10% of the field application volume is consumed through irrecoverable losses. These losses account for evaporation of water delivered to the field but not used by the crop. The Department calculates that an additional 20.3 AF are consumed as non-crop related evaporative losses based on a field application volume of 203.1 AF (203.1 AF x 10% = 20.3 AF). The total historical consumed volume for the 96.6 acres is 162.5 AF. This is based on the historical use information provided by the Applicant and includes both crop and non-crop related consumptive uses. (142.1 + 20.3 = 162.5)

Table 4: Calculated total consumption for historical POU

Ravalli County Flood/Sprinkler ET *(Inches)*	**Ravalli County 1973-2006 Management Factor *(Percent)***	**Historic Acres**	**HCV AF *(minus IL)***	**On-farm Efficiency**	**Field Application AF (Hist Diverted Volume)**	**Historic Irrecoverable Losses *(IL) sprinkler 10%:***	**HCV AF *(Including IL)***
19.93	88.6%	96.6	142.1	70%	203.1	20.3	**162.5**

16. Permit No. 76H 72226-00 is supplemental to five water rights, including Statement of Claim (Claim) Nos. 76H 2508-00, 76H 2509-00, 76H 124237-00 and 76H 147925-00, and Permit 76H 12497-00 for irrigation purposes. Permit 76H 72226-00 is associated with water right 76H 15711-00 because they share two places of storage, historical Reservoir Nos. 2 and 3. The supplemental water rights do not all share the exact same place of use. Based on the overlapping place of use relationships, the Department divided the 96.6 historically irrigated acres for Permit 76H 72226-00 into four sections to determine separate field application and historical consumed volumes for each water right used within that section. The allocation of the field application and historical consumed volumes in each of the four place of use sections provided by each water right was calculated using the percentage of the flow rate of each water right diverted to irrigate the acres within a specific section. Since each water right may not irrigate 100% of the acres within a given section, the flow rate diverted with each water right was adjusted based on the percentage of historically irrigated acres within a section irrigated by a given water right. The volumes calculated for each section of the 96.6-acre historically irrigated acreage were then added to arrive at the total field application and historically consumed volume provided by each supplemental water right. For Permit 76H 72226-00, the sum of the field application volume for each section equals 31.4 AF, and the sum of the historical consumed volume equals 25.8 AF. Table 6 below provides the allocation of field application and historically consumed volume for each supplemental water right and Permit 76H 72226-00. Below Table 6 is a description of each variable and how it was calculated. Based on this information, the Department finds the historical (irrigation) consumed and field application volumes for Permit 76H 72226-00 equal 25.8 AF and 31.4 AF, respectively.

Table 5: Historic Irrigation Consumptive Volume per Supplemental Water Right

Historic Irrigated Acres	Field App. (AF)	HCV (AF) *(with IL)*	Water rights Statement of Claim Permit	POU Water right flow rate totals (GPM)		76H 2508	76H 124237	76H 2509	76H 147925	76H 72226	76H 12497
					WR HCV (AF)	84.5	31	19	15.3	25.8	9.2
					WR HFAV (AF)	140.9	51.6	31.7	25.5	31.4	11.5
					Flow Rate (GPM)	1494.5	314.16	336.6	125.66	330	200
					SOC POU acres	71.9	21.5	71.9	10.6		
					Permit POU acres	62.6	19.8	62.6	9.8	96.6	9.8
9.8	20.6	16.5	76H 147925 76H 72226 76H 12497	358.7	*% of WR POU*				100%	10.1%	100%
					WR CV (AF)				5.8	1.5	9.2
					WR FAV (AF)				7.3	1.8	11.5
					WR % of Total Flow				35.2%	8.9%	55.9%
					POU Flow (GPM)				125.7	33	200
19.8	41.6	33.3	76H 124237 76H 72226	381.8	*% of WR POU*		100%			20.5%	
					WR CV (AF)		27.4			5.9	
					WR FAV (AF)		34.5			7.1	
					WR % of Total Flow		82%			18%	
					POU Flow (GPM)		314.2			67.6	
62.6	131.7	105.4	76H 2508 76H 2509 76H 72226	2045	*% of WR POU*	100%		100%		64.8%	
					WR CV (AF)	77		17.3		11	
					WR FAV (AF)	96.7		21.8		13.2	
					WR % of Total Flow	73.1%		16.5%		10%	
					POU Flow (GPM)	1494.5		336.6		213.9	
4.4	9.3	7.4	76H 72226	15	*% of WR POU*					4.6%	
					WR CV (AF)					7.4	
					WR FAV (AF)					9.3	
					WR % of Total Flow					100%	
					POU Flow (GPM)					15	

WR HCV (AF) = sum of 'WR CV (AF)' associated with specific 'Historic Irrigated Acres'
WR HFAV (AF) = sum of 'WR FAV (AF)' associated with each water right's 'Historic Irrigated Acres' place of use sections
SOC POU acres = total acres irrigated by claims prior to July 1, 1973 (historical POU for claims)
Permit POU acres = total acres irrigated by claims or permits after July 1, 1973 (historical POU for permits; supplemental POU for claims)
% of WR POU = proportion of the water right's 'SOC POU acres' or 'Permit POU acres' that is comprised by 'Irrigated Acres' = 'SOC POU acres' *or* 'Permit POU acres' ÷ 'Historic Irrigated Acres'
WR CV (AF) = portion of 'HCV AF (with IL)' that is attributed to each water right (for permit-irrigated acres, cells reflect *historic* consumption for permits only) = 'WR % of Total Flow' × 'HCV AF (with IL)'

WR FAV (AF) = portion of 'Field App. AF' that is attributed to each water right (for permit-irrigated acres, these cells reflect *historic* field application volumes for permits only) = 'WR % of Total Flow' × 'Field App. AF'
WR % of Total Flow = portion of 'POU Water right flow rate totals (GPM)' that is attributed to each water right = 'POU Flow (GPM)' ÷ 'POU Water right flow rate totals (GPM)'
POU Flow (GPM) = portion of water right's claimed/permitted flow rate that was used to irrigate 'Historic Irrigated Acres' = '% of WR POU' × 'POU Water right flow rate totals (GPM)'
POU Water right flow rate totals (GPM) = sum of all 'POU Flow (GPM)' associated with specific 'Historic Irrigated Acres'

17. Pursuant to the standards in ARM 36.12.1902(10), historical diverted volumes for irrigation purposes are equal to the sum of conveyance losses and field application volumes. Since water diverted from Well Nos. 2 and 3 were conveyed to the place of use via a pipeline there are no conveyance losses, and the historical diverted volume for the irrigation purpose is equal to the field application volume of 31.4 AF.

Table 6: Historical Irrigation Consumptive Volume Provided by 76H 72226-00

Ravalli County Flood/Sprinkler ET *(Inches)*	**Ravalli County 1973-2006 Management Factor**	**Historic Acres**	**HCV AF *(minus IL)***	**On-farm Efficiency**	**Field Application AF**	**Historic Irrecoverable Losses *(IL) sprinkler 10%:***	**HCV AF *(Including IL)***
19.93	88.6%	96.6	22.66	70%	31.4	3.14	**25.8**

18. Permit No. 76H 72226-00 also has historical consumption resulting from domestic use in one home and stock use for 150 AU with water diverted from Well No. 1 via pipeline. The Department calculated consumptive use for domestic purposes using the DNRC standards for a domestic residence with an on-site septic system for wastewater treatment, which is 10% of the 1 AF of diverted volume per home, or 0.10 AF. The stock consumptive use equals 100% of the 2.55 AF volume for 150 AU supplied water by this system. Also included in total historical consumptive use is the evaporation from Reservoir No. 2, which was calculated using 3.24 AF/acre based on Potts Evaporation of Small Ponds and a surface area of 3.67 acres. Based on this information, evaporative losses for Reservoir No. 2 equal 11.9 AF (3.67 acres x 3.24 AF/acre = 11.9 AF). The evaporative consumptive losses for Reservoir No. 3 (X acres surface area) are equal to X AF and are covered by Permit 76H 15711-00. The Department finds the total historical consumptive use for Permit 76H 72226-00 is 40.4 AF (25.8 AF irrigation + 0.10 AF domestic + 2.55 AF stock + 11.9 AF evaporation = 40.4 AF).

19. The Department certified Permit 76H 72226-00 in October of 2002 for a diverted volume of 248.55 AF. At the time of certification, the Applicant submitted power usage records from multiple years which showed a maximum diverted volume of 119.07 AF in 1999. The Applicant stated that the full permitted volume was not put to beneficial use due to wet years when

precipitation was sufficient to limit the need for pumping the wells. DNRC verified the permit with a volume of 248.55 AF, which included 1 AF for domestic use, 2.55 AF for stock and 245 AF for full service irrigation of 120 acres. The Applicant did not provide evidence that 245 AF was ever historically diverted for irrigation in any one season. Based on the Department's certification of Permit 76H 72226-00, the volume of 119.07 AF diverted in 1999 represents the highest volume of water historically diverted with this permit.

20. The Department finds a maximum historically diverted flow rate, diverted volume, and consumed volume of 340 GPM, 119.07 AF, and 40.4 AF for Permit 76H 72226-00.

FINDINGS OF FACT – Adverse Effect

21. This change application proposes to relocate Reservoir No. 3 from the NWNWNE of Section 35 to a new location in the E2E2NW of Section 35, T6N, R21W, and the relocated reservoir will be renamed Reservoir No. 1. The Applicant also proposes to reconfigure Reservoir No. 2 by reducing the surface area from 3.5 acres to 3 acres. The pipeline that historically conveyed water from Well Nos. 2 and 3 to Reservoir No. 2 will be reconfigured to convey water from these wells into the new Reservoir No. 1 instead of Reservoir No. 2, as was the historical practice. In addition to providing a location for stock watering, Reservoir No. 1 will also perform the function of a sediment trap for surface water prior to entering Reservoir No. 2 for irrigation pumping. The Applicant is not proposing to change the flow rate, diverted volume, point of diversions, or irrigation place of use for this water right.

22. The reconfiguration of Reservoir No. 2 will result in less surface area and a reduction of evaporative losses totaling 0.9 AF. Reservoir No. 2 has a current surface area of 3.5 acres and evaporated losses of 11.9 AF. The proposed new surface area is 3.0 acres, a reduction of 0.5 acres. The new evaporative losses are calculated to be 11.0 AF of evaporated loss (11.9 AF – 11.0 AF = 0.9 AF).

23. The historic consumptive use is 40.4 AF (FOF 18) and upon authorization of this change application the consumptive use will be 39.5 AF (25.8 AF irrigation + 0.10 AF domestic + 2.55 AF stock + 11.0 AF evaporation = 39.5 AF).

24. New Reservoir No. 1 has a proposed surface area of 0.59 acres, a depth of 8 feet, and a capacity of 2.36 AF. The historical Reservoir No. 3 has a surface area of 0.8 acres and a capacity of 3.2 AF. The replacement of Reservoir No. 3 with Reservoir No. 1 results in a reduction of 0.21 surface acres (0.8 acres – 0.59 acres = 0.21 acres) and a difference of evaporated loss

(consumptive use) of 0.74 AF. Permit 76H 72226-00 did not supply evaporative losses for historical Reservoir No. 3, as evaporation in this pond was offset using Permit 76H 15711-00, which lists existing Reservoir No. 3 as a place of use for fisheries.

25. The Department's analysis shows that the change in place of storage and place of use for stock watering will not result in an expansion of diverted volume or consumptive use. All three wells utilized for Permit 76H 72226-00 have power switches that allow the Applicant to control their diversion and to cease diversion if a valid call for water is received.

26. The Department finds there will be no adverse effect to other water users resulting from the proposed change in place of storage under the terms and conditions set forth in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

27. The Applicant is not proposing to change the amount or flow rate of water historically used, and the irrigation place of use, point of diversion, and purpose are not changing. The place of use for the stock purpose is changing with the relocation of historical Reservoir No. 3. Stock will continue to also drink water from existing Reservoir No. 2 per the historical practice.

28. The Applicant proposes to replace Reservoir No. 3 with Reservoir No. 1 (FOF 24) and convey water pumped from Well Nos. 2 and 3 directly into new Reservoir No. 1 before conveying water to reconfigured Reservoir No. 2 for stock watering and irrigation pumping. The purpose of the project is to improve the irrigation infrastructure on the property by creating a centralized pumping reservoir (Reservoir No. 2) for sprinkler irrigation.

29. The Applicant will continue to use water diverted from Well No. 1 for in-house domestic use.

30. The Department finds the replacement of Reservoir No. 3 with Reservoir No. 1 and reduction in size of Reservoir No. 2 for improved irrigation purposes and stock use to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

31. The primary means of diversion for Permit 76H 7226-00 consist of three wells. These wells have been in operation from 1989 to present. The flow rate, point of diversion, and purpose are not changing.

32. After this change, Well Nos. 2 & 3 will convey water directly to new Reservoir No. 1 via an existing 6-inch pipeline for continued sprinkler irrigation of the historically irrigated acres and stock use. The point of diversion for the wells are SWSENW of Section 35, T16W, R21W. Well No. 2 has a 15 hp motor an 8- inch casing with a flow rate of 130 GPM, and Well No. 3 has a 15 hp motor a 10-inch casing with a flow rate of 200 GPM.

33. Well No. 1 is pumped using a 0.5 hp motor and has a 6-inch casing with a flow rate of 10 GPM which is used solely for domestic and is not connected to the other two wells and will not be altered due to this proposed change.

34. Based on proposed diversionary system and reservoir specifications, the Department finds that the proposed change in storage infrastructure is adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

35. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

36. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use

permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).[1]

37. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of

[1] DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.[2]

38. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historic use" of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.[3] A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of

[2] See also Holmstrom Land Co., Inc., v. Newlan Creek Water District,185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff's subsequent right).

[3] A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9,1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).[4]

39. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512

[4] Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change …. The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).[5]

40. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

41. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

> The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the "amount historically consumed" and the water that re-enters the stream as return flow. . . .
> An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator "is entitled to have the water flow in the same manner as when he located," and the appropriator may insist that prior appropriators do not

[5] The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(*citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

> affect adversely his rights.
> This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.
> We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

42. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

43. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

44. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location

of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

45. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has not elected to proceed under ARM 36.12.1902. (FOF No.13).

46. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water").

47. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Beneficial Water Use Permit No. 76H 72226-00 of 119.07 AF diverted volume and 340 GPM flow rate with a consumptive use of 40.4 AF. (FOF Nos. 9-20)

BENEFICIAL USE

48. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under §

85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

49. Applicant proposes to use water for domestic, stock watering and irrigation, which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence domestic; stock and irrigation are beneficial uses and that 119.07 AF of diverted volume and 340 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. § 85-2-402(2)(c), MCA (FOF Nos. 27-30)

ADEQUATE MEANS OF DIVERSION

50. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

51. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 31-34)

POSSESSORY INTEREST

52. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

53. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 35)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76H 30148404 should be granted subject to the following.

The Department determines the Applicant may divert a flow rate of 340 GPM up to a volume of 119.07 AF from Well Nos. 1, 2, and 3 annually. The Applicant will continue diverting a flow rate of 10 GPM up to 1 AF of volume from Well No. 1 for domestic purposes from January 1 through December 31 annually. The Applicant may divert 330 GPM up to 118.07 AF from Well Nos. 2 and 3 for irrigation of 96.6 acres and stock use from January 1 through December 31 annually. The Applicant will replace Reservoir No. 3 with Reservoir No. 1, which will be located in the E2E2NW of Section 35. A portion of the place of use for stock watering will be changed from the NWNWNE of Section 35 to the E2E2NW of Section 35, T6N, R21W. Reservoir No. 1 will have a surface area of 0.59 acres and have a capacity of 2.36 AF. This change authorizes the direct conveyance of water diverted from Well Nos. 2 and 3 to Reservoir No. 1 before being conveyed to Reservoir No. 2 via an open earthen ditch. The Applicant may also reconfigure Reservoir No. 2 to reduce the surface area from 3.5 acres to 3.0 acres to have a capacity of 28.5 AF. Irrigation water will continue to be pumped from Reservoir No. 2 per the historical practice.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this 9th day of February 2023.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 9th day of February 2023, by first class United States mail.

YC PROPERTIES
1050 SATCOM LANE
MELBOURNE, FL 32940

WATER RIGHTS INC
ATTN: LEE YELIN
PO BOX 9285
MISSOULA, MT 59807

_____

Kathy Schubert, (406) 542-5892